Legal Opinion Letter

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SCIENTIFIC EVIDENCE IN STATE COURTS: FLORIDA REFORM AS A MODEL

by
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The long and winding road to expert evidence reform in Florida shows how the "right answer" can still carry the day notwithstanding the all-too-common partisan standoffs that provide a sorry proxy for actual engagement on policy differences. Florida Governor Rick Scott just this month signed into law a measure (H.B. 7015) that will bring Florida's evidentiary standard for admission of expert testimony in line with the federal *Daubert* standard codified in Federal Rule of Evidence 702, a standard now followed by an overwhelming majority of states. The *Daubert* standard requires courts to screen expert testimony for reliability – that the testimony is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert has applied the principles and methods in a way that reliably fits the facts of the case.

Some might question whether it qualifies as news that a "pro-business" legislature in a state with a similarly disposed governor has passed a tort reform measure that most view as "pro-defendant." Don't tell that to the folks on the ground in Florida who have been pushing to modernize the Florida standard since at least 2007 without success, notwithstanding a seemingly favorable landscape.

Defense attorneys viewed Florida's pre-reform standard as the nation's worst because of its so-called "pure opinion" loophole. The debate over the standard for admissibility of expert testimony is most often framed in the context of two federal court cases: *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which conditions the admissibility of expert testimony on whether the opinion has gained "general acceptance in the particular field in which it belongs, and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny, which require the court to screen offered expert testimony for reliability with reference to basic scientific principles. The 2008 Florida Judiciary Committee Report noted that by its count 22 states had adopted *Daubert*, 17 states used a hybrid standard of *Daubert*, and 10 states (including Florida) continued to apply the older *Frye* standard.

Unlike federal courts – which must apply Rule 702 and *Daubert* to all types of expert testimony – state courts may have different admissibility standards for different kinds of expert testimony, so simply determining whether a state applies the *Daubert* test or still applies *Frye* may not present an accurate picture of the true hurdle – or lack thereof – for admissibility of expert testimony. Under Florida's uniquely permissive "pure opinion" loophole to *Frye*, the issue was not what standard of analysis applied (*i.e.*, *Frye* vs. *Daubert*) but whether *any judicial scrutiny whatsoever* would apply prior to submitting the expert's opinion to the jury.

The Florida Supreme Court created the pure opinion exception in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2008), which instructed trial courts that "*Frye* is inapplicable in the vast majority of cases." The plaintiff in the *Marsh* case suffered from fibromyalgia and she sought to have her doctor testify that a car accident caused her condition. Based on the prevailing *Frye* test in Florida, the defendant asked the trial court to exclude this testimony given that the premise that trauma can cause fibromyalgia had not been generally accepted in the scientific community. *Marsh*, 977 So. 2d at 545. The trial court agreed, and although the intermediate appellate court affirmed that result, the Florida Supreme Court reversed based on the troubling reasoning that "[b]ecause testimony causally linking trauma to fibromyalgia is based on the

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experts' experience and training, it is 'pure opinion' admissible without having to satisfy *Frye*." *Id*. at 549. The Court explained that the *Frye* test "*only applies* when an expert attempts to render an opinion that is based upon *new or novel scientific techniques*." *Id*. at 547 (emphasis in original; internal quotation marks omitted). Therefore, according to the Court, "*Frye* is inapplicable in the vast majority of cases." *Id*. (internal quotation marks omitted). The majority focused on the specific causation opinion (whether trauma caused fibromyalgia in this plaintiff), but failed to recognize that the *Frye* test applies to the general causation opinion.

The dissent lamented that the majority opinion effectively eliminated any role for the courts in keeping speculative and unreliable expert testimony from the jury, because the "holding that an [expert's] opinion about specific causation need not pass the *Frye* test, even where the underlying theory of general causation is not accepted, in effect renders specific causation testimony always admissible as the 'pure opinion' of the expert." *Id*. at 562; *see also id*. at 563 ("Permitting an expert to testify that X caused Y in a specific case without requiring the general acceptance of the theory that X can *ever* cause Y expands the 'pure opinion' exception to the point where it swallows the rule." (emphasis in original)).

So, while the *Frye* standard allowed the admission of expert testimony based on an outdated standard widely criticized as lacking in scientific rigor, the Florida Supreme Court's "pure opinion" loophole essentially adopted a let-it-all-in approach, elevating a treating physician's gut feel as to the cause of her patient's malady to the level of expert proof. The effect was to make Florida courts a venue of choice for plaintiffs' counsel.

The defense bar has mounted a state-by-state effort over the past decade to make federal *Daubert* principles the consistent guiding standard in state courts across the country. That fight has been successful in many jurisdictions, and in some others has ended with legislative compromise, with tort reform advocates settling for the half-a-loaf result of a hybrid *Frye/Daubert* standard, or some other lesser-than-*Daubert* reform.

Advocates in Florida have had opportunities in recent years to declare partial victory by accepting amendments that would either create a hybrid standard, or leave the *Frye* standard intact and eliminate the pure opinion loophole. I argued against that approach in testimony given before various Florida legislative committees over the past few years, but privately discussed with others if something (i.e., getting rid of the pure opinion loophole) might not be in fact better than nothing in a state with as much litigation activity as Florida. Proponents of the *Daubert* standard stayed the course. In the most recent legislative session, the expert evidence debate appeared likely to end as it has for years prior, with legislative amendments offered by opponents to undercut the effectiveness of the bill, and sponsors opting to retreat in the face of waning support.

The first procedural twist for the legislation this year came in the Senate Rules Committee when Senator David Simmons proposed an amendment similar to his proposal in earlier years to adopt a hybrid system where expert testimony based on generally accepted science would be evaluated under *Frye*, while scientific evidence based on new principles and discoveries would be evaluated under *Daubert*. That amendment served as a poison pill of sorts in 2012, when the House and Senate failed to agree on a bill.

Senator Joe Negron described as "political theater" the repeating annual battle of the past few years over the *Frye* and *Daubert* standards and staked out the moral high ground: "What I am interested in is fairness in our courts, and that everyone has access to the courthouse, and plaintiffs are treated fairly and defendants are treated fairly." Negron's offered compromise rejected Simmons' proposed amendment, but altered the original proposal, which would have placed specific references to *Daubert* and succeeding cases into the state's evidence code, F.S. Ch. 90. Negron's amendment moves the references to those cases to the bill's introductory "whereas clauses" and instead puts the three-part test set up by *Daubert* into Ch. 90. From there the votes fell into place, with even Senator Simmons (a trial lawyer himself) voting for the measure as revised.

The new standard is a good result for Florida, a good result for those who seek justice in the civil or criminal courts of Florida, and a good model for staying the course to achieve meaningful reform. Perhaps it is also a model for the many instances in which partisan preference should not drive policy choices, just as forum shopping should not have the power to drive litigation outcomes.

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